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BUNIM MURRAY PRODUCTIONS

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

CALEB MCGILLVARY,

Plaintiff,

vs.

NETFLIX, BUNIM-MURRAY
PRODUCTIONS, JIMMY KIMMEL
LIVE!, KMPH FOX NEWS,
EBAUMSWORLD, FULTON 55,
RAWTV, COLETTE CAMDEN,
BRAD MULCAHY, ALEX
AGUIRRE, CARTER HARRIS, JEFF
STRIKER, GABRIEL SANCHEZ,
TONY MARTIN, LISA SAMSKY,
JENSEN RUFE, SALLE BRINDLE,
ROB MILLER, JOHN DOE 1-5,

Defendants.

Case No. 2:23-CV-01195-JLS-SK

**BUNIM-MURRAY
PRODUCTIONS' NOTICE OF
MOTION AND MOTION TO
DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT**

Date: June 7, 2024
Time: 10:30 a.m.
Dept: Courtroom 8A

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on June 7, 2024, at 10:30 a.m. or as soon as may be heard in Courtroom 8A of the United States District Court for the Central District of California, First Street Courthouse, 350 West First Street, Los Angeles, California 90012, defendant Bunim Murray Productions (“Bunim Murray”) will and hereby does move this Court for an order dismissing the claims against it in the Second Amended Complaint (“SAC”) asserted by *pro se* plaintiff Caleb L. McGillvary (“Plaintiff”). This Motion is exempt from the conference of counsel requirement under Local Rules 7-3 and 16-12(c) because Plaintiff is appearing *pro se*, is in custody, and is not an attorney.

This motion is made pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that Plaintiff’s SAC fails to state a claim for the following reasons:¹

- Plaintiff has not pleaded an agency relationship as to Bunim Murray;
- Plaintiff’s claims for “agency,” “conspiracy,” and “constructive trust” fail because they are not causes of action under California law;
- Plaintiff’s breach of confidence claim fails because he does not identify any information he conveyed to Bunim Murray that was “novel and confidential;”
- Plaintiff’s fraud claim fails because it is not pleaded with the requisite particularity under Rule 9(b), and because he fails to plead how he was damaged by any alleged misrepresentations by Bunim Murray;
- Plaintiff’s claims for defamation damages from Bunim Murray could be struck because he has not alleged that they are responsible for the underlying claim;
- Plaintiff’s RICO claim fails because he cannot show the existence of an enterprise involving Bunim Murray, because he cannot identify any conduct

¹ Bunim Murray has not been served with the SAC in this action, however, it proactively submits this Motion to Dismiss the SAC to preserve its arguments for dismissal of all claims.

1 constituting racketeering activity, and because he cannot demonstrate a pattern
2 of racketeering activity;

- 3 • Plaintiff's intentional infliction of emotional distress and public disclosure of
4 private facts claims fail because they are duplicative of his defamation claim and
5 barred by the First Amendment;
- 6 • Plaintiff's emotional distress claim also fails because his allegations are not
7 sufficiently egregious;
- 8 • Plaintiff's public disclosure of private facts claim also fails because Plaintiff
9 does not identify a private fact disclosed by Bunim Murray.

10 This Motion is based on this Notice, the attached Memorandum of Points and
11 Authorities, all pleadings, files and records in this action, and all other matters of which
12 the Court may take judicial notice.

13 DATED: April 30, 2024

Respectfully submitted,

14 HOWARD M. RUPP, APLC

15 By: By: /s/ H. Marc Rupp

16 Howard M. Rupp

17
18 CAMERON STRACHER, PLLC

19 By: /s/ Cameron Stracher

20 Cameron Stracher (*pro hac vice*)

21 Attorneys for Defendant

22 BUNIM MURRAY PRODUCTIONS
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff is a convicted murderer who brings this lawsuit against numerous defendants, asserting 51 causes of action in a 132-page, 457-paragraph complaint. As against defendant Bunim Murray, Plaintiff's claims arise from a car trip with two Bunim Murray employees in February 2013, from Santa Rosa to Hollywood, some of the details of which were recounted in the Netflix documentary, *The Hatchet Wielding Hitchhiker* (the "Documentary"). All of Plaintiff's claims against Bunim Murray should be dismissed, however, because beneath Plaintiff's rambling, discursive allegations, he fails to state a claim as a matter of law.

II. RELEVANT FACTUAL BACKGROUND

Plaintiff first achieved a certain level of notoriety when, on February 1, 2013, he used his hatchet to rescue a woman being assaulted by a driver who had picked up Plaintiff while he was hitchhiking. SAC ¶ 1. After the driver, Jett McBride, intentionally crashed his car into a crowd of power line workers, SAC ¶ 2(a), McBride attacked Tonya Baker, and Plaintiff "used his camping hatchet with force 3 times on McBride's head in defense of Tonya." *Id.* ¶ 2(c). Plaintiff's actions were widely reported upon, including by KMPH-TV, *see* SAC ¶ 7, and a video of the KMPH interview on YouTube currently has more than four million views. *See* FULL INTERVIEW WITH KAI, THE HOMELESS HITCHHIKER WITH A HATCHER, <https://www.youtube.com/watch?v=-Xa0NfCdLk4> (last visited February 15, 2024). The KMPH interview was then sampled by the Gregory Brothers and turned into a song, which currently has more than eleven million views. *See* SMASH, SMASH, SMASH!, <https://www.youtube.com/watch?v=wDQTVuP1Dgs> (last visited February 15, 2024); *see also* SAC ¶ 8 (claiming that Plaintiff "registered his copyright to the dramatic work "Smash, Smash, SUH-MASH!" on February 6, 2013).²

² The Court may consider these videos, as well as the Documentary, in ruling on Bunim Murray's motion because they are referenced and incorporated in Plaintiff's

1 In the wake of the reporting about Plaintiff's actions, Bunim Murray
 2 contemplated producing a reality television series focusing on Plaintiff. SAC ¶ 15. On
 3 February 9, 2013, Defendant Lisa Samsky ("Samsky") contacted Plaintiff to offer him a
 4 ride to Hollywood. SAC ¶¶ 16–20. According to Plaintiff, Samsky represented that she
 5 was an agent of Jimmy Kimmel, and offered him a "limousine full of marijuana if
 6 Plaintiff would perform for Jimmy Kimmel." *Id.* ¶ 18. Mistakenly believing that
 7 Samsky and Defendant Jensen Rufe were agents of Kimmel's, Plaintiff accepted a ride
 8 with them from Santa Rosa to San Francisco, and then later to Hollywood, Beverly
 9 Hills, and Hermosa Beach. *Id.* ¶¶ 20 & 27. In fact, both Samsky and Rufe worked for
 10 Bunim Murray.³ *Id.* ¶ 16. During the ride, Plaintiff alleges, Samsky and Rufe gave him
 11 a contract to sign, but he was too intoxicated to understand it or spell his name, and he
 12 "simply drew 'hieroglyphics' on the document." *Id.* ¶ 20. Plaintiff also alleges that
 13 during the ride, he "conveyed confidential and novel information" to Samsky and Rufe,
 14 although he does not specify the nature of the information, which they recorded. *Id.* ¶
 15 24. Later, Plaintiff claims, the "BM Defendants" sold the recordings to Defendants
 16 Netflix and RawTV. *Id.* ¶ 77.

17 On February 10, 2013, Plaintiff alleges that Samsky and Rufe "transferred
 18 guardianship" to Defendants Brad Mulcahy and Jimmy Kimmel Live.⁴ *Id.* ¶ 28.
 19 Plaintiff does not allege that he had any further contact with Bunim Murray, and he
 20 does not allege to have ever had any contact with any agents or employees of Bunim
 21 Murray aside from Samsky and Rufe.⁵

22 _____
 23 SAC. *See Knievel v. ESPN*, 393 F.3d 1068, 1076–77 (9th Cir. 2005) (court may
 24 consider matters referenced in, but not attached to, a complaint). The Documentary is
 available via Netflix: <https://www.netflix.com/title/81436777>.

25 ³ The SAC refers to Samsky, Jensen, and Bunim Murray collectively as the "BM
 26 Defendants." *See* SAC ¶ 16.

27 ⁴ The SAC refers to Samsky, Jensen, Bunim Murray, Mulcahy, and Jimmy
 28 Kimmel Live collectively as the "BMJKL Defendants." *See* SAC ¶ 17.

⁵ Plaintiff claims to have sent the "Legal Notice ... Of Disavowal Of Voidable
 Contract," attached to the SAC as Exhibit J to Bunim Murray, but does not claim to
 have received any response. *See* SAC ¶ 91.

1 Several months later, in May 2013, Plaintiff was arrested for and ultimately
 2 convicted of murdering New Jersey attorney Joseph Galfy, Jr. *State v. McGillvary*,
 3 2021 WL 3378024, at *1 (N.J. App. Aug. 4, 2021). He is currently serving a 57-year
 4 sentence for his crime. *See id.*; *McGillvary v. New Jersey*, 142 S. Ct. 1685 (2022)
 5 (denying cert).

6 In 2023, Netflix released the documentary *The Hatchet Wielding Hitchhiker*.
 7 SAC ¶ 101. The Documentary featured numerous interviews about Plaintiff, his
 8 actions, his media appearances, and his crime, and includes recollections from Samsky
 9 and Rufe about their interactions with Plaintiff in 2013. *See* SAC ¶¶ 82, 84. Bunim
 10 Murray was not involved in the production of the Documentary. *See id.* ¶ 78.

11 III. ARGUMENT

12 To state a valid claim under Rule 8 of the Federal Rules of Civil Procedure, the
 13 factual allegations in the complaint must be sufficiently precise to raise a right to relief
 14 above the speculative level. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–57 (2007)
 15 (*Twombly*); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*Iqbal*) (plaintiff must
 16 “plead[] factual content that allows the court to draw the reasonable inference that the
 17 defendant is liable for the misconduct alleged”). At a minimum, a complaint must
 18 allege enough specific facts to provide “fair notice” of the claim being asserted, and
 19 “the grounds upon which it rests.” *Twombly*, 550 U.S. at 555; *see also McHenry v.*
 20 *Renne*, 84 F.3d 1172, 1177–80 (9th Cir. 1996) (upholding Rule 8 dismissal of a
 21 complaint that was “argumentative, prolix, replete with redundancy, and largely
 22 irrelevant”); *Brazil v. U.S. Dep’t of Navy*, 66 F.3d 193, 199 (9th Cir. 1995) (holding that
 23 even *pro se* pleadings “must meet some minimum threshold in providing a defendant
 24 with notice of what it is that it allegedly did wrong”); *Schmidt v. Herrmann*, 614 F.2d
 25 1221, 1224 (9th Cir. 1980) (upholding Rule 8 dismissal of “confusing, distracting,
 26 ambiguous, and unintelligible pleadings”); *Amarise v. Related Companies*, 2020 WL
 27 8474757, at *5 (C.D. Cal. Nov. 24, 2020) (dismissing *pro se* complaint comprised of
 28 “jumbled allegations about things that have gone wrong throughout [plaintiff’s] life

1 [that] do not provide any basis for determining why the Defendants have been sued here
 2 and under what sort of cognizable claim they might be liable”).

3 Here, Plaintiff’s claims against Bunim Murray should be dismissed because they
 4 do not meet these federal pleading standards.

5 **A. PLAINTIFF HAS NOT PLEADED AN AGENCY RELATIONSHIP**
 6 **AS TO BUNIM MURRAY.**

7 As an initial matter, all of Plaintiff’s claims against Bunim Murray fail because
 8 they are based solely on the conduct of Samsky and/or Rufe, and Plaintiff has not
 9 adequately alleged an agency relationship between Samsky and/or Rufe and Bunim
 10 Murray. “To sufficiently plead an agency relationship, a plaintiff must allege facts
 11 demonstrating the principal’s control over its agent.” *Imageline, Inc. v. CafePress.com,*
 12 *Inc.*, 2011 WL 1322525, at *4 (C.D. Cal. Apr. 6, 2011); *see also id.* (“The essential
 13 elements of an agency relationship are: (1) that the agent or apparent agent holds power
 14 to alter legal relations between the principal and third persons and between the principal
 15 and himself; (2) that the agent is a fiduciary with respect to matters within the scope of
 16 the agency; and (3) that the principal has right to control the conduct of the agent with
 17 respect to matters entrusted to him.”) (quotations omitted). Here, Plaintiff merely
 18 asserts that Samsky and Rufe “were employees and agents of Bunim Murray” or “were
 19 acting under the apparent authority of Bunim Murray and/or Jimmy Kimmel” during
 20 the car trip in 2013. SAC ¶ 103. Such legal conclusions are insufficient to plead an
 21 agency relationship as a matter of law. *See Iqbal*, 556 U.S. at 678 (“A pleading that
 22 offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of
 23 action will not do.’”) (quotations omitted); *Imageline*, 2011 WL 1322525 at *4 (finding
 24 that plaintiff’s assertion that “each defendant was the ‘agent, partner, servant,
 25 supervisor, employee, successor and/or joint venturer of each of the remaining
 26 defendants’” was “nothing more than legal conclusions of the type prohibited by *Iqbal*
 27 and *Twombly*”). Thus, on this basis alone, all of Plaintiff’s claims against Bunim
 28 Murray should be dismissed.

Moreover, Plaintiff does not allege that Samsky or Rufe were agents of Bunim Murray when they were interviewed for the Documentary in 2021, eight years after the car trip. Thus, Plaintiff's claims against Bunim Murray for breach of confidence (Count One), intentional infliction of emotional distress (Count Thirty-Seven), public disclosure of private facts (County Forty-Five), and violations of RICO (Count Forty-Nine and Count Fifty), which are all premised on the alleged statements made by Samsky and Rufe in the Documentary, should be dismissed on that independent ground. *See* SAC ¶¶ 118, 265, 306, 353, 358, 371, 376.

B. PLAINTIFF'S CLAIMS FOR "AGENCY," "CONSPIRACY," AND "CONSTRUCTIVE TRUST" ARE NOT CAUSES OF ACTION.

To the extent Plaintiff asserts independent causes of action for "Agency" (unnumbered "Legal Claim," SAC ¶¶ 102–109), "Conspiracy" (Count Six), and "Constructive Trust" (Count Nine), those claims should be dismissed because they are not causes of action under California law. *See Fleites v. MindGeek S.A.R.L.*, 617 F. Supp. 3d 1146, 1167 (C.D. Cal. 2022) (dismissing conspiracy claim where Plaintiff either "mistakenly pled civil conspiracy as a standalone tort" or failed "to make clear which tort causes of action [defendant] allegedly conspired to commit"); *Arouchian v. Bank of Am., N.A.*, 2012 WL 12897038, at *3 (C.D. Cal. Oct. 11, 2012) ("[C]onstructive trust is not a cause of action . . ."); *Tanvilai v. Safeco Ins. Co. of Am.*, 2008 WL 11338883, at *3 n. 2 (C.D. Cal. Mar. 27, 2008) (setting forth the "elements of an agency theory of liability") (emphasis added); *Applied Equip. v. Litton Saudia Arabia*, 7 Cal. 4th 503, 510–11 (Cal. 1994) ("Conspiracy is not a cause of action . . . Standing alone, a conspiracy does no harm and engenders no tort liability.").

C. PLAINTIFF FAILS TO STATE A CLAIM FOR BREACH OF CONFIDENCE.

Plaintiff's claim for breach of confidence (Count One) also fails because he does not – and cannot – allege its basic elements. In order to prevail on a breach of confidence claim, a plaintiff must show that: "(1) [he] conveyed confidential and novel

1 information; (2) [defendants] had knowledge that the information was being disclosed
 2 in confidence; (3) there was an understanding between [defendants] and [plaintiff] that
 3 the confidence be maintained; and (4) there was disclosure or use in violation of the
 4 understanding.” *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 903 (9th Cir. 1987) (citing
 5 *Tele-Count Engineers, Inc. v. Pac. Tel. & Tel. Co.*, 168 Cal. App. 3d 455, 462–65 (Cal.
 6 Ct. App. 1985)).

7 Plaintiff makes only conclusory assertions regarding his breach of confidence
 8 claim and does not identify what, if any, “confidential and novel” information he
 9 conveyed to Bunim Murray through Samsky and/or Rufe. *See* SAC ¶ 24 (alleging
 10 generally that he “conveyed confidential and novel information to BM Defendants” but
 11 not identifying the information). Accordingly, Count One should be dismissed. *See*
 12 *Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action,
 13 supported by mere conclusory statements, do not suffice.”); *see also Gusler v.*
 14 *Kawasaki Motors Corp.*, 2000 WL 491703, at *1 (9th Cir. Apr. 26, 2000) (affirming
 15 dismissal of breach of confidence claim where plaintiff’s idea was not novel); *Reed v.*
 16 *Nat’l Football League*, 2015 WL 13333481, at *4 (C.D. Cal. Sept. 24, 2015) (granting
 17 motion to dismiss breach of confidence claim where plaintiff’s actions indicated
 18 relevant information was not confidential).

19 **D. PLAINTIFF FAILS TO STATE A CLAIM FOR FRAUD.**

20 Plaintiff also fails to state a claim for fraud because he has failed to plead facts in
 21 support of the required elements with particularity. A claim for fraud under California
 22 law requires a plaintiff to demonstrate; 1) a false representation by the defendant, 2)
 23 knowledge of its falsity, 3) an intent to defraud, 4) justifiable reliance by the plaintiff,
 24 and 5) damages. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003).
 25 Under Fed. R. Civ. P. 9(b), a plaintiff must plead fraud with particularity. *Id.* at 1103–
 26 04. To satisfy Rule 9(b), “[t]he circumstances constituting the alleged fraud [must] be
 27 specific enough to give defendants notice of the particular misconduct so that they can
 28

1 defend against the charge and not just deny that they have done anything wrong.” *Id.* at
 2 1106 (internal quotations omitted).

3 Plaintiff’s nebulous assertion that “BM Defendants defrauded Plaintiff of the
 4 value of his performing services . . . which Plaintiff was deprived of through BM
 5 Defendants’ Fraud” does not sufficiently allege a claim for fraud against Bunim Murray.
 6 SAC ¶ 257. The claim improperly lumps defendants together and does not provide
 7 sufficient facts to inform Bunim Murray of the details of its alleged participation in the
 8 fraud. *See United States v. Corinthian Colleges*, 655 F.3d 984, 997–98 (9th Cir. 2011)
 9 (“Rule 9(b) does not allow a complaint to merely lump multiple defendants together but
 10 requires plaintiffs to differentiate their allegations when suing more than one defendant
 11 and inform each defendant separately of the allegations surrounding his alleged
 12 participation in the fraud.”). As a result, the SAC fails to allege facts that show Plaintiff
 13 relied on any false representation by Bunim Murray to his detriment.

14 To the extent Plaintiff claims he was defrauded by Samsky’s alleged
 15 misrepresentation about working for Jimmy Kimmel, *see* SAC ¶ 18, his claim still fails
 16 because he has not pleaded facts demonstrating how he was damaged. To recover for
 17 fraud, a plaintiff must show that “he has sustained some pecuniary damage or injury by
 18 reason of having been put in a position worse than he would have occupied had there
 19 been no fraud.” *Colby v. Newman*, 2013 WL 12125529, at *6 (C.D. Cal. Aug. 29,
 20 2013) (citation omitted). The plaintiff “must have incurred actual monetary loss as a
 21 result of [d]efendants’ alleged fraud.” *Id.* Here, Plaintiff does not identify any
 22 monetary loss resulting from the alleged misrepresentation that Samsky was an agent of
 23 Jimmy Kimmel. He also fails to plead facts identifying his “performing services” or
 24 what value he allegedly lost by providing them. SAC ¶ 257. Accordingly, his fraud
 25 claim against Bunim Murray (Count Thirty-Three) should be dismissed. *See Mathison*
 26 *v. Bumbo*, 2008 WL 8797937, at *8 (C.D. Cal. Aug. 18, 2008) (holding that plaintiffs’
 27 allegation that they “would not have acted as they did” was not sufficient to plead
 28 damages for claim); *Colby*, 2013 WL 12125529, at *6 (granting motion to dismiss fraud

1 claim where plaintiffs' general claim that he suffered "lost profits, [and] lost assets" did
2 not sufficiently plead damages).

3 **E. PLAINTIFF'S REQUEST FOR DAMAGES FROM BUNIM**
4 **MURRAY ARISING FROM DEFAMATION SHOULD BE**
5 **STRICKEN.**

6 Although Plaintiff does not identify any allegedly defamatory statements made
7 by Bunim Murray, his Prayer for Relief requests damages against the BM Defendants
8 "jointly and severally" for damages arising from his defamation claim against Rufe,
9 SAC ¶ 438. In addition to failing to plead an agency relationship as to Bunim Murray
10 in general, Plaintiff does not plead that Rufe was an employee of Bunim Murray when
11 his allegedly defamatory statements were made, or that he was otherwise acting under
12 Bunim Murray's authority when he made them. *See supra*, III.A; *see also* SAC ¶¶ 103
13 (claiming that Rufe acted as an agent of Bunim Murray only during the events related to
14 the car trip in 2013). Accordingly, Plaintiff's request for damages from Bunim Murray
15 arising from his defamation claim should be stricken.⁶

16 **F. PLAINTIFF FAILS TO PLEAD A CLAIM FOR VIOLATION OF**
17 **THE RICO STATUTE.**

18 Plaintiff also brings a cause of action against Bunim Murray and other defendants
19 for violation of the federal RICO statute, 18 U.S.C. § 1961, *et seq* (Count Forty-Nine
20 and Count Fifty). *See* SAC ¶¶ 350–385. Specifically, Plaintiff asserts that as a
21 participant in the "BM Defendants' Enterprise" and the "BMJKL Defendants'
22 Enterprise," Bunim Murray formed a conspiracy in violation of section 1962(d). SAC
23 ¶¶ 350, 368. Under section 1962(d), it is "unlawful for any person to conspire to violate
24 any of the provisions of subsections (a), (b), or (c)," and the only substantive subsection
25 identified by Plaintiff is (c). SAC ¶¶ 358, 364–65, 376, 382–83. To state a claim under
26 18 U.S.C. § 1962(c), a plaintiff must allege the existence of a RICO enterprise and that

27 ⁶ In the alternative, Plaintiff's defamation claim should be dismissed for the
28 reasons set forth in Rufe's Motion to Dismiss. *See* Lisa Samsky and Jensen Rufe's
Motion to Dismiss (ECF 127) 6–8.

defendants participated in a “pattern of racketeering activity.” 18 U.S.C. § 1962(c); accord *Howard v. Am. Online Inc.*, 208 F.3d 741, 746 (9th Cir. 2000). On the face of Plaintiff’s SAC, however, Bunim Murray’s alleged activities are insufficient to establish any required element of Plaintiff’s RICO conspiracy claim.

1. Plaintiff cannot establish that Bunim Murray conducted a RICO enterprise.

RICO liability does not exist unless each defendant has participated in the operation or management of the enterprise itself. *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). To participate in a RICO enterprise, a defendant must have some role in directing the affairs of the enterprise. *Baumer v. Pachl*, 8 F.3d 1341, 1344 (9th Cir. 1993). Moreover, to state a RICO claim involving multiple defendants, a plaintiff must allege facts showing that *each* of the defendants conducted or participated in an enterprise through a pattern of racketeering activity. See *Dual Diagnosis Treatment Ctr., Inc. v. Centene Corp.*, 2021 WL 4464204, at *6 (C.D. Cal. May 7, 2021) (“The ‘touchstone’ of a civil RICO claim is that each individual defendant must be shown to have personally participated in a pattern of racketeering activity.”) (internal quotations omitted); *Flores v. Emerich & Fike*, 416 F. Supp. 2d 885, 911 (E.D. Cal. 2006) (conclusory allegations that defendants “engaged in a laundry-list of purported predicate acts” insufficient to establish RICO claim). Finally, a RICO conspiracy requires that each defendant assented to contribute to the enterprise. *Baumer*, 8 F.3d at 1346–47.

Here, the SAC refers to Bunim Murray collectively with other defendants and fails to attribute specific racketeering activities to it or allege that it agreed to contribute to the RICO enterprise. See, e.g. FAC ¶¶ 213–216 (referring generally to “BM Defendants” and “BMJKL Defendants”). This alone renders Plaintiff’s RICO claim deficient. See *Baumer*, 8 F.3d at 1346–47 (affirming dismissal of RICO claim where “the bare allegations of the complaint provide[d] no basis to infer assent to contribute to

1 a common enterprise”); *Dual Diagnosis*, 2021 WL 4464204 at *6 (finding plaintiff
2 failed to state a RICO claim where complaint referred to defendants collectively).

3 In addition, Plaintiff fails to allege “evidence of an ongoing organization” and
4 “evidence that the various associates function as a continuing unit” as required to
5 establish an association-in-fact RICO Enterprise. *Bredberg v. Middaugh*, 2022 WL
6 2662878, at *1 (9th Cir. July 11, 2022) (citation omitted).⁷ Although Plaintiff generally
7 refers to the “BM Defendants’ Enterprise,” the SAC is bereft of any factual allegations
8 evidencing an organization or continuing unit involving Bunim Murray. In other
9 words, Plaintiff does not allege that Bunim Murray was “associated together” with the
10 other Defendants for a “common purpose.” *See id.* (“[T]he complaint must describe ‘a
11 group of persons associated together for a common purpose of engaging in a course of
12 conduct.’”) (citation omitted). Therefore, Plaintiff’s RICO claims against Bunim
13 Murray should be dismissed. *See id.* (affirming dismissal of RICO claim where the
14 alleged racketeering activity was the only connection among the defendants, “which is
15 not sufficient to establish the existence of an enterprise”); *Hunt v. Zuffa, LLC*, 2021 WL
16 4355728, at *2 (9th Cir. Sept. 24, 2021) (affirming dismissal of RICO claim where,
17 although plaintiff alleged that defendants were “members of the RICO enterprise, he
18 [did] not sufficiently allege that these alleged associates functioned as a unit, as
19 opposed to a collection of unrelated individuals”).

20 **2. Plaintiff has failed to allege a “racketeering activity.”**

21 In addition, Plaintiff has failed to allege that Bunim Murray engaged in any sort
22 of “racketeering activity.” Plaintiff’s RICO claim is premised on his allegation that
23 Samsky and Rufe recorded him while he was intoxicated and “in the United States in
24 violation of law,” SAC ¶¶ 24, 27, and that the BM Defendants were subsequently paid
25 to provide those recordings for the Documentary. *Id.* ¶¶ 77, 358, 376. However,
26

27 ⁷ Under the RICO statute, “an enterprise may be a legal entity or an association-
28 in-fact.” *Bredberg*, 2022 WL 2662878 at *1. Plaintiff admits there was no legal entity
enterprise involving Bunim Murray. *See* SAC ¶¶ 350, 368.

1 recording someone while they are intoxicated or otherwise engaged in unlawful activity
 2 is not a racketeering activity. *See* 18 U.S.C. § 1961 (listing conduct that qualifies as
 3 “racketeering activity”).

4 To the extent the SAC asserts that Samsky’s alleged misrepresentation about her
 5 connection to Jimmy Kimmel constitutes wire fraud, which serves as a RICO predicate
 6 act, Plaintiff’s claim should still be dismissed. *See* SAC ¶¶ 351, 354–57, 369, 372–75.
 7 A RICO claim predicated on wire fraud must satisfy the Rule 9(b) heightened pleading
 8 requirements. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 541 (9th Cir. 1989);
 9 *Rosen v. Duel*, 2023 WL 7475733, at *3 (C.D. Cal. Mar. 21, 2023). Plaintiff has failed
 10 to satisfy these pleading standards for his fraud claim. *See, supra* III.D.⁸ Thus,
 11 Plaintiff’s failure to adequately plead an underlying racketeering activity alone merits
 12 dismissal of Plaintiff’s RICO claim.⁹ *See, e.g. Quach v. Cross*, 2004 WL 2860346, at *5
 13 (C.D. Cal. June 10, 2004), *aff’d*, 252 F. App’x 775 (9th Cir. 2007) (dismissing RICO
 14 claim because allegation of “bogus sting” operation against plaintiff’s business did not
 15 constitute “racketeering activity”); *Jennings v. Emry*, 910 F.2d 1434, 1438 (7th
 16 Cir.1990) (dismissing RICO claims because, *inter alia*, “[w]hile alleging statutory

18 ⁸ Plaintiff also fails to plead facts demonstrating that the alleged wire fraud was
 19 the proximate cause of any alleged harm, which is independently fatal to his RICO
 20 claim. *See Rosen*, 2023 WL 7475733 at *4–5 (dismissing RICO claim with prejudice
 21 where the allegations underlying plaintiff’s wire fraud claim were “too far attenuated”
 from the alleged issues that ultimately harmed plaintiff).

22 ⁹ Plaintiff also incorporates his claims about allegedly defamatory statements
 made by Rufe into his RICO claim by reference. *See* SAC ¶¶ 353, 358, 371, 376
 23 (incorporating paragraph 84). However, defamation is not a predicate act under section
 24 1961. *See* 18 U.S.C. § 1961(1); *Wegner v. Wells Fargo Bank, N.A.*, 791 F. App’x 669,
 671 (9th Cir. 2020) (“[Plaintiff’s] first RICO cause of action was properly dismissed
 25 because it is based on defamation, which is not a predicate act under RICO”); *Michalak*
v. Edwards, 1997 WL 561424, *4 (6th Cir. 1997) (“conspiracy to defame cannot serve
 26 as the predicate criminal act necessary for the imposition of civil RICO liability”);
 27 *Conte v. Newsday, Inc.*, 703 F.Supp.2d 126, 138 (S.D.N.Y. 2010) (“It is . . . well
 established that defamation does not provide a requisite predicate act for a RICO
 28 claim.”); *Kimm v. Lee*, 2005 WL 89386, at *5 (S.D.N.Y. Jan. 13, 2005), *aff’d sub nom.*
Kimm v. Chang Hoon Lee & Champ, Inc., 196 F. App’x 14 (2d Cir. 2006) (recognizing
 same and collecting cases).

violation—indeed, while just about incorporating all of the federal and Indiana codes—the allegations d[id] not allege racketeering acts”).

3. **Plaintiff cannot plead a pattern of racketeering activity.**

Even assuming Plaintiff has adequately alleged that Bunim Murray engaged in racketeering activity, the SAC does not establish a pattern. Plaintiff essentially complains of a single scheme allegedly used to obtain recordings and information from Plaintiff to create the Documentary. SAC ¶¶ 77, 358, 376 (claiming that the BM Defendants and BMJKL Defendants’ exchange of the recordings of, or information about, Plaintiff for “moneys or other benefits” constitutes prohibited activity under 18 U.S.C. 1962(c)). This is insufficient to demonstrate a pattern of racketeering activity. *See* 18 U.S.C. § 1961(5) (noting that a “‘pattern of racketeering activity’ requires at least two acts of racketeering activity”); *Howard*, 208 F.3d at 746 (“Two acts are necessary, but not sufficient, for finding a [RICO] violation.”); *see also Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535 (9th Cir. 1992) (affirming dismissal of RICO claim where multiple acts were part of a single scheme allegedly designed to impoverish plaintiff); *McGowan v. Weinstein*, 505 F. Supp. 3d 1000, 1013 (C.D. Cal. 2020) (plaintiff failed to alleged RICO violation where, “[t]hough the Complaint sets out a long and winding story of fraud and deceit” the “allegations reflect only a singular plan and purpose”).

Moreover, the Supreme Court has ruled that “to prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.” *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (emphasis in original). Here, Plaintiff offers no facts in support of a threat of continued criminal activity. Rather, his SAC alleges only a single, completed plan and purpose—to create the Documentary using improperly obtained materials. *See McGowan*, 505 F. Supp. 3d at 1013 (dismissing plaintiff’s RICO claim where, *inter alia*, she failed to show how the alleged acts presented a threat of continued criminal activity); *Quach*, 2004 WL 2860346 at *6

(same). The allegations against Bunim Murray are therefore not only insufficient to state a claim for a RICO violation, but they affirmatively negate that such claim could ever be plausible. Accordingly, Plaintiff's RICO claims against Bunim Murray should be dismissed with prejudice. *See, e.g., Eclectic Props. East, LLC v. Marcus & Millichap Co.*, 2012 WL 713289, at *17 (N.D. Cal. Mar. 5, 2012) (dismissing RICO claim with prejudice where "[i]t does not appear to the court that plaintiffs could plead around these facts so as to formulate a viable RICO claim against defendants"); *Prime Partners IPA of Temecula, Inc. v. Chaudhuri*, 2012 WL 1669726, at *12 (C.D. Cal. May 14, 2012) (dismissing RICO claim with prejudice where allegations were factually unsupported and implausible); *Encarnacao v. Phase Forward Inc.*, 2012 WL 404971, at *4 (C.D. Cal. Feb. 7) (same), *reconsideration denied* by 2012 WL 870674 (Mar. 14, 2012); *Quach*, 2004 WL 2860346 at *9 (same).

G. PLAINTIFF'S REMAINING CLAIMS FAIL AS A MATTER OF LAW.

Plaintiff's remaining claims for intentional infliction of emotional distress and public disclosure of private facts must also be dismissed because: 1) they are barred by the First Amendment; 2) Plaintiff fails to state a claim for emotional distress on its own merits; and 3) Plaintiff fails to identify a private fact that was disclosed as required to maintain his privacy claim.

1. Plaintiff's Claims Are Barred By the First Amendment

Because Plaintiff's claims arise from the broadcast of the Documentary, the First Amendment requires that they be dismissed because Plaintiff cannot establish the elements of a defamation claim, *see, supra* n. 6, and he may not use other torts to "end run" the constitutional protections for speech. *See Snyder v. Phelps*, 562 U.S. 443, 458–59 (2011) (holding that the First Amendment barred plaintiffs' emotional distress claims because they were based on a defendant's exercise of their First Amendment rights to speak publicly on a matter of public interest); *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (dismissing emotional distress claim because plaintiff could not

1 prove the elements of a cause of action for defamation); *Mireskandari v. Daily Mail &*
 2 *Gen. Tr. PLC*, 2013 WL 12114762, at *29 (C.D. Cal. Oct. 8, 2013) (“The Free Speech
 3 Clause of the First Amendment provides a defense to suits for intentional infliction of
 4 emotional distress.”); *Dworkin v. Hustler Magazine, Inc.*, 668 F.Supp. 1408, 1420
 5 (C.D. Cal. 1987) (Plaintiff “cannot maintain a separate cause of action for mental and
 6 emotional distress where the gravamen is defamation.”), *aff’d*, 867 F.2d 1188 (9th Cir.
 7 1989); *Flynn v. Higham*, 149 Cal. App. 3d 677, 682 (Cal. Ct. App. 1983) (“[T]o allow
 8 an independent cause of action for the intentional inflection of emotional distress,
 9 based on the same acts which would not support a defamation action, would allow
 10 plaintiffs to do indirectly that which they could not do directly.”).

11 In addition, the First Amendment provides a separate defense to any publication
 12 of private facts claim where the published information is true and newsworthy.
 13 *Anderson v. Perez*, 2023 WL 8881512, at *31 (C.D. Cal. Sept. 8, 2023)
 14 (“‘[N]ewsworthiness’ is a complete bar to liability for publication of truthful
 15 information”). “[N]ewsworthiness is not limited to ‘news’ in the narrow sense of
 16 reports of current events.” *Jackson v. Mayweather*, 10 Cal. App. 5th 1240, 1257 (Cal.
 17 Ct. App. 2017), *as modified* (Apr. 19, 2017). “It extends also to the use of names,
 18 likenesses or facts in giving information to the public for purposes of education,
 19 amusement or enlightenment, when the public may reasonably be expected to have a
 20 legitimate interest in what is published.” *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th
 21 200, 225 (Cal. Ct. App. 1998), *as modified on denial of reh’g* (July 29, 1998).

22 Because the subject matter of the Documentary is newsworthy, the First
 23 Amendment bars Plaintiff’s publication of private facts claim. *See Cox Broad. Corp.*
 24 *v. Cohn*, 420 U.S. 469, 492 (1975) (“The commission of crime, prosecutions resulting
 25 from it, and judicial proceedings arising from the prosecutions . . . are without question
 26 events of legitimate concern to the public . . .”).

1 **2. Plaintiff Fails to State a Claim for Emotional Distress.**

2 Plaintiff cannot demonstrate a probability of prevailing on his emotional distress
3 claim. The first element of a claim for intentional infliction of emotional distress is
4 “extreme and outrageous conduct by the defendant with the intention of causing, or
5 reckless disregard of the probability of causing, emotional distress.” *Davidson v. City*
6 *of Westminster*, 32 Cal. 3d 197, 209 (Cal. 1982). Such conduct “must be so extreme as
7 to exceed all bounds . . . usually tolerated in a civilized community.” *Cervantez v. J.C.*
8 *Penney Co.*, 24 Cal. 3d 579, 593 (Cal. 1979). To the extent Plaintiff claims Bunim
9 Murray is liable for his emotional distress as a result of Samsky and Rufe’s
10 participation in the Documentary, Plaintiff cannot, as a matter of law, demonstrate that
11 Samsky and Rufe’s alleged conduct in publicizing Plaintiff’s behavior in connection
12 with a matter of public significance was extreme and outrageous. *See, e.g., Comstock v.*
13 *Aber*, 151 Cal. Rptr. 3d 589, 607 (Cal. Ct. App. 2012) (allegation that employee had
14 falsely accused fellow employee of committing a sexual assault in a report to a nurse
15 and the employer’s human resources department insufficient to constitute extreme and
16 outrageous conduct); *Reeves v. Fox Television Network*, 983 F. Supp. 703, 711 (N.D.
17 Ohio 1997) (concluding that facts failed to support finding that “defendants’ conduct in
18 videotaping plaintiff’s encounter with the police and broadcasting a portion of that
19 videotape on the ‘COPS’ television show constitutes outrageous and extreme conduct,
20 beyond all possible bounds of decency”); *Brown v. Hearst Corp.*, 54 F.3d 21, 27 (1st
21 Cir. 1995) (concluding that media defendants’ conduct in televising broadcast strongly
22 suggesting that plaintiff had murdered his wife was not extreme and outrageous);
23 *Hogan v. Hearst Corp.*, 945 S.W.2d 246, 251–52 (Tex. Ct. App. 1997) (publication of
24 names of persons arrested for lewd conduct not extreme and outrageous behavior
25 sufficient to support intentional infliction of emotional distress claim).

26 As the foregoing cases demonstrate, the absence any factual allegations that can
27 meet the threshold element of “outrage” is, as a matter of law, determinative of
28 Plaintiff’s emotional distress claim.

1 **3. Plaintiff Fails to State a Claim for Public Disclosure of Private**
2 **Facts.**

3 Plaintiff also has not stated a claim for public disclosure of private facts because
4 he has not identified any private information that Bunim Murray has disclosed. To state
5 a claim for public disclosure of private facts, a plaintiff must demonstrate “(1) public
6 disclosure (2) of a private fact (3) which would be offensive and objectionable to the
7 reasonable person and (4) which is not of legitimate public concern.” *Hogan v.*
8 *Weymouth*, 2019 WL 11055032, at *5 (C.D. Cal. Aug. 19, 2019). Here, it is not clear
9 from the SAC what facts Bunim Murray allegedly disclosed in violation of Plaintiff’s
10 right to privacy. Thus, Plaintiff’s public disclosure of private facts claim should be
11 dismissed.

12 **IV. CONCLUSION**

13 For all the foregoing reasons, Bunim Murray respectfully requests that the Court
14 grant its motion to dismiss the SAC with prejudice, enter judgment in its favor and
15 against Plaintiff, and afford to it such other and further relief as the Court may deem
16 just and proper.

1 Dated: April 30, 2024

Respectfully submitted,

2
3 HOWARD M. RUPP, APLC

4 By: /s/ H. Marc Rupp
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6
7 CAMERON STRACHER, PLLC

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for defendants Bunim Murray Productions, certifies that this brief contains 5,454 words, which complies with the word limit of L.R. 11-6.1.

Dated: April 30, 2024

Respectfully submitted,

HOWARD M. RUPP, APLC

By: /s/ H. Marc Rupp
Howard M. Rupp

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2024, a true copy of the foregoing was served on Plaintiff via U.S. Mail to the address provided in his pleadings:

Caleb L. McGillvary
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I further certify that I caused a true copy of the foregoing to be served on all defendants' counsel of record via ECF.

By: /s/ H. Marc Rupp
Howard M. Rupp